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No. 80-1306

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DIANE DOE, By Robert Doe and Naomi Doe,
Her Parents and Next Friends,

Petitioner

v.

OMER RENFROW, Individually And As Superintendent of Schools Of The Highland Community School Corporation; GEORGE KURTEFF, Individually And As Principal of Highland Senior High School; HARVEY KEIM, Individually And As Principal of Highland Junior High School; JOHN GUIDEN, LORRAINE KING, LAWRENCE VASSER, BURTON MASEPOHL, And JOHN TERPSTRA, Individually And As Members Of The Board of Trustees of The Highland Community School Corporation; NOEL HALL, As A Member Of The Board of Trustees Of The Highland Community School-Corporation; AL PRENDERGAST, Individually, As Chief Of Police Of Highland, Indiana, And As A Member Of The Board Of Trustees Of The Highland Community School Corporation; JAMES TUROCI, As Chief Of Police Of Highland, Indiana; And PATRICIA LITTLE, Individually And As Deputy Sheriff Of Miami County, Indiana,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(BY RESPONDENTS, AL PRENDERGAST and JAMES TUROCI)

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourth Amendment prohibit school officials from detaining students in a classroom during regular school hours in order to facilitate a school drug inspection?

2. Does the Fourth Amendment prohibit school officials from using drug detecting dogs on school grounds to identify students in possession of drugs?

3. Does the Fourth Amendment prohibit school officials from requiring a student to empty his pockets following an alert to the student by a drug detecting dog?

4. Did the district judge abuse his discretion in denying certification of plaintiff's proposed class?

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Al Prendergast and James Turoci, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Seventh Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Indiana is reported at 475 F. Supp. 1012 (N. D. Ind. 1979). The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 631 F. 2d 91 (7th Cir. 1980). Opinions of four judges of the court of appeals dissenting from the denial of rehearing are also reported at 631 F. 2d 91, 93-95 (7th Cir. 1980). All opinions are reproduced in the Appendix to petitioner's brief.

JURISDICTION

Respondents accept the jurisdictional statement submitted by Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept the constitutional and statutory provisions set forth by Petitioner.

STATEMENT OF THE CASE

Respondents join in the statement of the case contained in the brief of Respondents Omer Renfrow, et al.

SUMMARY OF ARGUMENT

This case does not involve questions of exceptional importance. The case involves the use of drug-detecting dogs in the classrooms during regular school hours in an effort to promote a sound educational environment. The extension of the first period class in order to accommodate the drug inspection was not a seizure within the meaning of the Fourth Amendment. The students were required to be in school at that time, and the school administration had the authority and duty under Indiana law to regulate the activity of the students.

No reasonable expectation of privacy was invaded by virtue of the drug inspection. The presence of the dogs and their handlers in the respective classrooms for a short period of time was a minimal intrusion at best and does not rise to the level of a constitutional violation. The police officers were present in this case merely to assist the school officials with the enforcement of school disciplinary rules. There was no criminal investigation underway. There was specific agreement among all parties concerned that no arrests would be made as a result of the drug inspection conducted at the Highland schools.

The pocket searches conducted during the drug inspection were valid under established Fourth Amendment principles. No pocket search was made unless one of the trained dogs had previously alerted his handler to the probable presence of drugs. In the school context, reasonable cause is sufficient to justify the pocket search. An alert by a trained dog provides reasonable cause.

The judgment of the Court of Appeals is consistent with the decisions of this Court. The decisions of this Court in the school context require a balancing between the students' constitutional rights and the duties of the school officials to provide a sound educational environment. The cases cited by the petitioner in an attempt to demonstrate a conflict between this Court's decisions and the decision of the Seventh Circuit Court of Appeals are either inapplicable or can be distinguished.

No other federal court has issued a final decision addressed to the same issues involved in this case. The only decision cited by petitioner in her brief which creates an apparent conflict is an interlocutory decision from a district court in Texas. In the absence of further consideration of this issue by the lower federal courts, it would be inappropriate for this Court to accept this case for full review at this time.

Even the petitioner does not seriously argue in her brief that the class action issues in this case justify issuing the Writ of Certiorari. The district court is permitted to exercise broad discretion in granting or denying a request for certification of a class. In the instant case, the district court properly evaluated the circumstances and denied the class certification.

ARGUMENT

A.

This Case Does Not Involve Questions of Exceptional Importance.

This petition concerns the constitutionality of the following acts by Highland school officials: 1) The extension of the first period class for an additional two hours for all Highland students; 2) The use of drug detecting dogs in the classrooms; and 3) The pocket searches which followed after an alert by one of the dogs. This petition does not concern the eleven nude searches which occurred during the course of the Highland drug inspection. The District Court determined that the nude searches were unreasonable under the Fourth Amendment. Respondents have never challenged the District Court's determinations. The issues in this case concern only those actions by Highland school officials which occurred before the nude search and during regular school hours. No students were detained in school beyond the regular school day.

The question raised by the Highland drug inspection may be answered by applying the Fourth Amendment principles established by this Court and by other federal courts. A seizure within the meaning of the Fourth Amendment occurs whenever an official acting under color of law restrains an individual's freedom to walk away. *Terry* v. *Ohio,* 392 U. S. 1, (1968). Petitioner argues that the detention of students in this case was a seizure under the Fourth Amendment. It is absurd to suggest that school officials may not restrain students' freedom during the course of a school day without violating the Fourth Amendment. School officials have the authority to schedule a student's activities throughout the school day commensurate with the educational needs and goals of the student. As the trial record shows, it was not unusual for students at the Highland Junior and Senior High Schools to be kept in a particular classroom for extended periods. In this case, students

were not detained after school hours. The entire detention occurred during normally scheduled class time. Petitioner's argument that the detention in this case involves a question of exceptional importance is wholly without merit.

The constitutionality of using drug-detecting dogs has never been addressed by this Court. However, lower federal courts have consistently approved the use of drug-detecting dogs where the dogs do not invade any reasonable expectation of privacy. See, e.g., *U. S.* v. *Fulero,* 498 F. 2d 748 (D. C. Cir. 1974); *U. S.* v. *Bronstein,* 521 F. 2d 459, (2d Cir. 1975), cert. den. 424 U. S. 918, (1976). The use of drug-detecting dogs has been validated because no Fourth Amendment search occurs where the dogs do not invade any reasonable expectation of privacy. As the District Court clearly explained:

> Bringing these nonschool personnel into the classroom to aid the school administrators in their observation for drug abuse is, of itself, not a search. Students are exposed to various intrusions into their classroom environment. The presence of the canine team for several minutes was a minimal intrusion at best and not so serious as to invoke the protections of the Fourth Amendment. (Petitioner's Appendix, 13a-14a)

This petition does not present an opportunity to address the general issues concerning the use of drug detecting dogs. The use of the trained dogs in this case was very limited. First, the drug inspection took place in a school context. As discussed below, constitutional rights in the school context must be balanced against the comprehensive authority of school officials to prescribe and control conduct in the schools. *Tinker* v. *Des Moines School District,* 393 U. S. 503 (1969). Second, the dogs were used in this case by school officials in connection with enforcement of school disciplinary rules rather than by police officers in connection with criminal investigations. This case does not involve the use of drug detecting dogs by police officers in schools as part of a general criminal investigation.

The very limited use of drug detecting dogs in this case falls well within the constitutional bounds established by lower federal courts concerning the use of such dogs.

Petitioner further argues that the actions of the Highland school officials following an alert by one of the dogs present questions of exceptional importance. The pocket searches conducted by school officials in this case were clearly valid under established Fourth Amendment principles. An alert by a drug detecting dog provides probable cause for a search. *U. S.* v. *Solis,* 536 F. 2d 880 (9th Cir. 1976). Lower federal courts have consistently indicated that a lesser standard than probable cause is sufficient to justify a reasonable search in the school context. Courts have generally described this lesser standard as "reasonable cause" or "reasonable suspicion." See, e.g., *Moore* v. *Student Affairs Committee of Troy State University,* 284 F. Supp. 725 (M. D. Ala. 1968); *M.* v. *Board of Education Ball-Chatham Community Unit School District No. 5,* 429 F. Supp. 288 (S. D. Ill. 1977). The dog's alert to the petitioner in this case provided ample justification for the limited pocket search.

B.

The Judgment of the Court of Appeals Is Consistent with the Decisions of this Court.

The lower court opinions in this case are consistent with the Fourth Amendment decisions of this Court. The constitutional rights of students are not equivalent to the constitutional rights of the general citizenry. The constitutional rights of students must be analyzed in light of the special characteristics of the school environment. Petitioner has correctly cited *Tinker* v. *Des Moines School District,* 393 U. S. 503, (1969), as the leading case in the area of students' rights. In *Tinker,* this court prohibited school officials from interfering with students who chose to wear black armbands in protest of

the Vietnam War. This court protected the First Amendment rights of students where students did not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." This court further indicated that the First Amendment would not guarantee a student's freedom of speech where a student's conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker,* 393 U. S. 503, 513. This court's analysis in *Tinker* requires a balancing between a student's constitutional rights and the duty of school officials to provide an orderly and disciplined school environment. The decisions below properly balanced the rights and duties at issue.

Petitioner argues that the decisions of the lower courts in this case conflict with five prior decisions of this Court concerning Fourth Amendment rights. The "specific and articulable facts" standard established in *Terry* v. *Ohio,* 392 U. S. 1 (1968), is inapplicable to this case in light of this court's opinion in *Delaware* v. *Prouse,* 440 U. S. 648 (1979). *Prouse* validates seizures absent specific and articulable facts where the seizure is non-discretionary and non-intrusive. This court approved the questioning of all traffic at roadblock-type stops. The detention of the students and use of the dogs in this case is certainly less intrusive in the school context than a roadblock-type stop on a highway. Therefore, specific and articulable facts were not required in this case before the pocket searches were undertaken.

Davis v. *Mississippi,* 394 U. S. 721 (1969), involved a mass investigatory detention. The detention in this case is clearly distinguished since school officials are authorized by Indiana statute to regulate a student's movements on a daily basis. *Ybarra* v. *Illinois,* 444 U. S. 85 (1979) involved a similar mass investigatory detention. This court determined that the detention in *Ybarra* was unconstitutional because the police officers had no constitutional basis for seizing and searching the bar patrons. In this case, the Highland school officials had the

authority to detain students in their first period classrooms during the first half of the school day. Thus, neither *Davis* nor *Ybarra* are applicable to the facts of this case.

In *Marshall* v. *Barlow's Inc.*, 436 U. S. 307 (1978), this court held that OSHA is subject to the Fourth Amendment prohibitions whenever an OSHA inspector attempts to search a place protected by a reasonable expectation of privacy. No reasonable expectation of privacy was broached in this case by the Highland school officials until the pocket searches were initiated, at which point the officials had reasonable cause for conducting the searches. In *Torres* v. *Puerto Rico,* 442 U. S. 465 (1979), this court invalidated a Puerto Rico statute authorizing the warrantless search of baggage belonging to passengers arriving in Puerto Rico from the United States. This court found that such passengers had a reasonable expectation of privacy in their baggage. Therefore, probable cause and a warrant were required for search of the baggage. Here, the students had no reasonable expectation of privacy as they sat in their classrooms to prevent the use of drug detecting dogs.

C.

There are no Conflicting Final Judgments by Another Court of Appeals or a District Court.

There are no final decisions by other federal courts which are in conflict with the lower court decisions in this case. Petitioner argues that this Court should issue the Writ of Certiorari in this case because of an apparent conflict with *Jones* v. *Latexo Independent School District,* 499 F. Supp. 223 (E. D. Tex. 1980). The facts in the *Jones* case are quite similar to the facts in this case. However, petitioner fails to indicate in her brief that the decision in *Jones* is not final. On September 3, 1980, Judge Justice issued a preliminary injunction in the *Jones* case requiring the school officials to reinstate the plaintiffs without any academic penalties. Judge Justice also prelimi-

narily enjoined further use of drug-detecting dogs by the Latexo school officials. The *Jones* case is still on the docket of the Texas District Court, pending further consideration of the issues involved in that case. It would be inappropriate to grant the petition in this case on the basis of an apparent conflict between this case and the *Jones* case, since the decision in the *Jones* case is not yet final.

D.

The Class Certification Issues Present No Basis for Issuing the Writ.

The lower court opinions in this case are consistent with the decisions of this court concerning certification of proposed classes under Rule 23 of the Federal Rules of Civil Procedure. This court allows a district court to exercise broad discretion in permitting or denying certification of a proposed class. *Califano* v. *Yamasaki,* 442 U. S. 682, (1979). A district court's decision concerning certification will be set aside only upon a showing of an abuse of discretion. Petitioner has failed to show any abuse of discretion.

Petitioner cites only one case, *Allee* v. *Medrano,* 416 U. S. 802 (1974), in support of the argument that class certification should have been granted in this case. It is difficult to see how that case supports petitioner's argument since this court did not address the class certification issue except to indicate that "there was no challenge here to the District Court's conclusion that this was a proper class action." *Allee* v. *Medrano, supra,* n. 10.

CONCLUSION

Student drug use, inside and outside school, has increased dramatically in recent years. The growing drug problem in our schools affects all students, not simply those who indulge in the use of drugs. School officials have resorted to various disciplinary measures in order to curb the use of drugs in schools. This petition concerns a drug inspection undertaken by Highland, Indiana school officials in March, 1979. The police were not in any form conducting any criminal investigation and specifically agreed to make no arrests. The police were assisting the school officials as required by statute. Plaintiff-petitioner alleges that the entire drug inspection violated her rights under the Fourth Amendment. A thorough analysis of her claim, as has been performed by the lower courts, negates petitioner's allegations. In any event, this case is not ripe for review by this Court as only one Court of Appeals has addressed the issues presented.

Respectfully submitted,

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